IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

UNITED STATES EX REL. WILLIAM A. DOSS,
Petitioner,

vs.

E. E. LINDSLEY, SHERIFF, PIATT COUNTY, ILLINOIS,
Respondent.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI; REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Specification 1.

This is an error of fact, and it would be superfluous to attempt an argument in its support. It is a little astonishing when it is noted that the petitioner has stood on this proposition from the beginning of this litigation and never swerved from it in *any court*. The strangest circumstance of all, however, is that no court seems willing to take the trouble even to discuss the fundamental question.

Specification 2.

In *People* v. *Zimmerman* (1928), 278 U. S. 63, Bryant was held under a statute which he asserted violated his rights under the Fourteenth Amendment, and sought a

writ of habeas corpus. In that case, this Court carefully examined his contention. Here this petitioner contends, and has in all courts contended, that he is held under judgment pursuant to a statute he asserts violates his rights under the Fourteenth Amendment. But he cannot persuade any court in Illinois, nor could he persuade the lower Federal courts, to examine seriously the question he raises. It is respectfully submitted that it is an error which this Court should correct, in effect to refuse a man convicted of a crime a hearing upon the very essence of his defense. That comes dangerously close to being just plain denial of justice in this case. As we see the merits of this argument, we shall present it under Specification No. 3, post.

Specification 3.

We think that Section 402, Chapter 38, Smith-Hurd An. Stat., under which this petitioner was found guilty of criminal libel and sentenced to jail, as applied to the undisputed facts (stated in Count I of the indictment) and interpreted by the lower courts, state and federal, is an unconstitutional restriction upon the right of free speech and a free press and that, therefore, the judgment against this petitioner is void and should be so pronounced. The statute is set forth below:

> "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury."

The indictment, Count I, on which the petitioner was found guilty and referred to in the lower court (R. 37) reads as follows:

> "Carl Glasgow (meaning Carl I. Giasgow) is not a fair and impartial prosecutor—no sir, (1) in the Muse

case I say he (meaning Carl I. Glasgow) is either persecutor, or an unfair prosecutor, (2) in the Ard case, or should be case, he (meaning Carl I. Glasgow) wrongfully shields that man; (3) (a) in the recent Bell Criminal Case he (meaning Carl I. Glasgow) wrongfully fails to prosecute; (b) and that was my truck more than the Bell's for which we got out the complaint, I wrote it; he (meaning Carl I. Glasgow) wrongfully uses and bargains the dismissal of that Criminal case, totally ignores my rights as a citizen, to get the sheriff his (meaning Carl I. Glasgow) client out of a bad civil damage suit;! (4) He (meaning Carl I. Glasgow) basely and wrongfully threatened and asserted falsely to Dwight Doss, as a fact that father Muse would be indicted for bribery in that bastardy case! unless (?) or if (?) somebody (?) did not ? ? What did he (meaning Carl I. Glasgow) mean? He (meaning Carl I. Glasgow) failed on this threat! Why did he (meaning Carl I. Glasgow) make it?

"Yes, in my judgment Carl Glasgow (meaning Carl I. Glasgow) would have a hard time, a very hard time indeed,—to save his State's Attorney commission in not being taken from him (meaning Carl I. Glasgow), if he (meaning Carl I. Glasgow) were prosecuted for these and various acts of malfeasance in office (meaning thereby to charge that the said Carl I. Glasgow had been guilty of conduct unbecoming a member of the legal profession to such an extent that his license to practice law could be taken from him by the Supreme Court of the State of Illinois) but he (meaning Carl I. Glasgow) need not worry, I'll give him (meaning Carl I. Glasgow) no such direct trouble—I'll do mine locally and all in the open,—and right thru 'Liberty' so if I am wrong on my facts or actions, I am liable for damages and ready to go to jail, but I think the public is honest and fair, and it will stand by me now, it begins to see things!; I know I have tackled a gigantic machine, 'tis a big one, it goes all over Piatt county and even over into other counties for their help,—but I'm watching those angles too!"

The language is strong, yes, but not nearly so violent as language used in the press and from the platform about the President of the United States in some recent and current periods in our history, and hundreds of public officers throughout the United States. Moreover, the strongest statement, that the State's attorney was a liar and a cheat, the jury seemingly found to be true, and the publication thereof justified. This is important. It is to be noted that if the statements in Count I were not true, the officer had at all times the protection of the civil laws against defamation of character, which he did not invoke. This is a material fact in the opinion of this Court. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639, 641, quoted page 16 hereof. The freedoms of speech and of press are not to be restricted in order to protect civil rights "susceptible to redress by other means." It is to be noted, also, that the charge under the second count (App.), that the State's attorney was a liar and a cheat, if true and spoken of a lawyer in certain circumstances, constitutes amply sufficient grounds for disbarment. The petitioner's deductions on the subject of the "Commission" of the State's attorney find justification in the verdict of the jury.

A close analysis of Count I of the indictment, on which the judgment of the court rests, shows its flimsy character as a reason for curtailing the freedom of the press. The first paragraph is probably the most important. The second paragraph seems serious upon its face, but really is merely a particularization with respect to the charge set forth in Count II, namely, that the State's attorney was a "liar and a cheat," with deductions from the "facts." Obviously, if this statement be true, the suggestion in paragraph second of Count I would not be farfetched—would certainly be a deduction justifiable under the constitutional guaranties of free expression as not

amounting to a "great and present danger" to any paramount public interest in behalf of which this constitutional right may be curtailed. Per contra, if such a statement be true of a public official it is in the public interest that it be known as generally as possible. It is to the interest of the "liar and cheat" in the public service that the cloak of secrecy shall continue to conceal his peccadillos from the public view.

The first paragraph of Count I therefore contains the words on which the State rests its claim of power to restrict the freedom of the press and punish the citizen criminally for an abuse of this constitutional right. Here the petitioner charges that the State's attorney is "either a persecutor, or an unfair prosecutor"; and that he "is not a fair and impartial prosecutor." Then follows numerous alleged cases which are given in supporting the charge.

It is respectfully submitted that there are very few prosecutors in the United States who have not frequently been called "unfair," or "persecutors," or "partial." *No prosecutor is impartial, and the constitution and the general law of the United States and of every state and territory in the Union presume that prosecutors are not impartial.* That is why the law at public expense appoints counsel for impecunious defendants; everybody knows that the prosecutor is a biased and partial fellow, and will not protect the defendant whom he prosecutes. *Johnson* v. *Zerbst*, 304 U. S. 458, 463. To say that a prosecutor is unfair, or not impartial, or even that he is a persecutor, is to give expression in common parlance to a fact which underlies some of the fundamentals of our constitution and of our criminal procedure. To jail a man or a publisher for such a statement would be branded an outrage if it happened in a totalitarian country instead of our own.

Petitioner charged, according to the indictment, that the State's attorney "wrongfully shields a man," giving the name. Is not this a commonplace accusation against a prosecutor who pursues some, but not all, offenders? He "failed to prosecute," but who has not heard that charge a thousand times? He "bargains the dismissal of a criminal case"; but it is a matter of universal knowledge that prosecutors *bargain* for pleas and agree not to prosecute other charges as a part of the bargain. Nothing in this record shows that this was not just one of such cases, which in the practical administration of law, public officers do not, for a good or perhaps not a good reason, choose to prosecute. Again, petitioner is charged with saying that the State's Attorney had threatened to prosecute and not done so! What trivialities are called up to throttle free speech and a free press in Illinois!

There it is. No charge is here made which is not commonplace in relation to public prosecutors throughout the country. *It is respectfully urged that because of the commonplace character of these charges, no "paramount public interest" was put in such "great and present danger" as to justify the imprisonment of this petitioner and a restriction upon the right of freedom of expression.*

First. The rights of free speech and of a free press may not be restricted in order *"to protect private rights susceptible of redress by other means."* This Court has said that

> "freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. (Right of the state to impose restrictions on a public utility.) They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect * * * They may not be restricted in order to protect private rights *susceptible to redress by other means."* (Emphasis supplied.)
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> *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, 641.

In re W. A. Doss, 367 Ill. 570, we have an illustration of the failure of that court to grasp the fundamental rights of individuals under the First and Fourteenth Amendments. The court there said:

> "The publication of newspaper articles, regardless of when they appeared * * * (is) especially to be condemned. (P. 573.) * * * The fifth complaint charged respondent with the preparation and the publication of numerous newspaper articles which, although appearing after the trial of the cases involved, criticised the court and the prosecuting officers in intemperate language."

Contrast this with what this Court said in *Bridges* v. *State of California*, 314 U. S. 252 (1941), where, among other things, it was stated:

> "Such criticism after final disposition of the proceedings would clearly have been privileged (P. 272) * * * The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion."

The civil remedies of Illinois governing defamation of character were all open to the State's Attorney of Piatt county, but he did not resort to them. Instead, he invokes a penal statute which can be sustained only on the theory that it serves a public interest which is paramount to the right of free speech and a free press.

Second. It is now settled that there must appear "clear and present danger" in order to justify "restrictions upon expression where the substantive evil sought to be prevented by the restrictions is destruction of life or property, or invasion of the right of privacy." *Bridges* v. *State of California*, 314 U. S. 252, 262. The Court there said that the criteria "applicable under the Constitution to other types of utterances" are applicable "in contempt proceedings to out-of-court publications pertaining to a pending case." 314 U. S. at page 268.

Specification 4.

The lower courts rely on *Ex parte Hawk*, 321 U. S. 114. This case does *not hold*, nor does any other, that it is impossible for a party to exhaust *all* his remedies in the State courts without resort specifically and *eo nomine* to *habeas corpus*. The underlying reason for the rule in the federal courts is the historic reluctance of these courts to take from the custody of the State a person who is held by state authority, until the courts of the state have had a full opportunity to pass upon the identical legal question which the petitioner raises in the federal courts. In the light of the reason for and, therefore, the rule, the petitioner, now a suppliant at the bar of this Court, has accorded the state courts full opportunity to pass on the question he now urges here, and each time the courts of Illinois have either ignored the question or resolved it against him.

The Hawk case is not controlling because its facts are essentially different from the facts here; but in the statement of the general doctrine, it is controlling in favor of this petitioner, in this, that while it requires, as a prerequisite, that the petitioner exhaust "all state remedies available," it does not hold that this rule cannot be complied with without resort to habeas corpus. Put differently, the meaning of the rule is that every appropriate State remedy which, in the circumstances of each case, suggests the possibility that the State courts *may* grant relief, must be invoked before coming to the federal courts; it does not, on the other hand, mean that every conceivable procedural remedy, always including *habeas corpus*, must be resorted to by the petitioner *after* all the available State tribunals have refused him relief in *some* suitable and proper State proceeding, upon the very facts which in a *habeas corpus* or any other proceeding would be before such courts. Why stop with *habeas corpus?* Why not require the aggrieved

convict to resort to *coram nobis?* Or *coram vobis?* Or some or all of numerous motions increasingly available in various jurisdictions to test the correctness of legal procedure? Is it not plain that if the test is some formal procedure rather than the actual result in substance, our whole system of justice becomes absurd?

In the *Hawk* case the Court said that the

> "petitioner's present contentions have been presented to the state courts only in an application for habeas corpus filed in the Nebraska Supreme Court, which it denied without opinion. From other opinions of that court it appears that it does not usually entertain original petitions for habeas corpus, but remits the petitioner to an application to the appropriate district court of the state, from whose decision an appeal lies to the State Supreme Court."

(P. 116.) The Court continues in the *Hawk* case:

> "Of this remedy in the State Court petitioner has not availed himself. Moreover, Nebraska recognizes and employs the common law writ of *coram nobis* which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of the constitutional right of the defendant in the course of the trial."

(P. 116)

In *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, the court reiterated the doctrine thus, without any requirement that *habeas corpus* must in all cases be resorted to as a preliminary:

> "Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of habeas corpus * * * recourse should be had to whatever judicial remedy offered by the State may still remain open."

It cannot reasonably be said that any remedy "may still remain open" when the courts have passed upon identical fact situations in a proceeding *differing only in name.*

This is exactly what was done here. We exhausted all State remedies and then came to the District Court and thence to this Court. And it does

> "appear that the question presented here has been considered on the merits by the Supreme Court (of Illinois) in a prior proceeding."
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> *Ex parte Williams*, 217 U. S. 604, 63 S. Ct. 431.

Specification 5.

The petitioner was restrained of his liberty when he sought the writ from the District Court. He had surrendered to his sureties—in what circumstances does not appear, but see Rec., 8—and was in their custody. So says the trial judge who had the prisoner before him and therefore must be presumed to have known the facts (R., 12). Under Illinois law, sureties have the legal right to *arrest* the principal. This statute was enacted at least as long ago as 1874. R. S., Illinois, March 27, 1874, p. 348, div. 3, Sec. 12. It is found in Smith-Hurd An. Stat., Chap. 38, Sec. 620, and reads as follows:

> "For the purpose of surrendering the principal, the sureties or any of them may arrest the principal at any place, or may authorize any other person to make the arrest."

The sureties, then, when they have the prisoner in custody, whether through voluntary surrender, on their own initiative, or otherwise, are officers or agents of the state; they may arrest; they may empower another to do so. A person in the custody of sureties in Illinois is clearly under such legal restraint as satisfies the most rigid rule in habeas corpus proceedings.

Specification 6.

This has been dealt with under the foregoing assignments of error and will not, at this time, be further elaborated, excepting to say that it has become hornbook law that the decisions of the state tribunals interpreting the statutes of the State are not binding or conclusive upon the federal courts when it is asserted by persons or corporations that rights secured them by the federal Constitution are abridged, or violated by the interpretations challenged.

The adjudication of the Circuit Court of Piatt County, which was affirmed by the Supreme Court of Illinois, that the finding of the petitioner guilty under the facts and circumstances detailed in this record, as this petitioner has contended and now contends, are a direct violation of the right of free speech and of free press, guaranteed him by the federal Constitution.

> "But, as has been held, very often, the question whether a State law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution, depends not upon the form of the Act, nor upon how it is construed or characterized by the State Court, but upon its practical operation and effect."

American Manufacturing Co. v. *City of St. Louis* (1918), 250 U. S. 459, 462, 39 S. Ct. 522; *Howard* v. *Fleming,* 191 U. S. 126, 24 S. Ct. 49.

Conclusion.

WHEREFORE, it is respectfully submitted that the petitioner has been aggrieved by the decision of the Circuit Court of Appeals of the Seventh Circuit, which by this petitioner is believed to be erroneous, and that a writ of cer-

tiorari, directed to the said Court, should be issued, requesting that this cause be certified to the Supreme Court of the United States for determination, as hereinbefore first petitioned.

Respectfully submitted April 12, 1945.

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